WP(C) 7204/2005
BEFORE
THE HON'BLE MR JUSTICE B.K. SHARMA

Ambuja Cement Eastern Ltd., a company duly incorporated under the Companies Act. 1956, having its registered office at Rawan, Balodabazar, P.S. - Balodabazar, District - Raipur, Chattishgarh and corporate office at 96C, Topisa Road (South) P.S. - Topisa, Kolkata-700046, District - South 24 Paraganas, West Bengal.

& Petitioner

- Versus -

1. Oil and Natural Gas Corporation Ltd., registered under the Companies Act, 1956 having its registered office at Jeewan Bharali Tower-II, 124 Cahhanght Circus, New Delhi-110001 and Regional Business Centre at Nazira, P.O. & P.S. - Nazira, District-Sibsagar.

2. Justice Arun Kr. Dutta (Retired), Arbitrator, 138, Supreme Enclave, Mayur Vihar-1, P.S. - Delhi-110091 and also 59/1A, Prince Baktiar Shah Road, P.S. - Jadavpur, Kolkata-700033.

& Respondents

BEFORE
THE HONBLE MR. JUSTICE B.K. SHARMA

For the petitioner: Mr. N. Dutta, Sr. Advocate
Mr. G. Baishya,
Mrs. R. Gogoi,
Mr. N.C. Das, Advocates

For the respondents:Mr. M. Roy,
Ms. D. Bhattacharyya,
Ms. S. Senapati, Advocates

Date of hearing: 11.1.2007 & 13.2.2007

Date of Judgment & Order: 02-03-2007

JUDGMENT AND ORDER

This application under Article 227 read with Article 226 of the Constitution of India alongwith Section 151 of the Code of Civil Procedure is directed against the order passed by the learned Civil Judge (Sr. Division), Sivasagar refusing to entertain the application filed by the petitioner under Order 39, Rule 1 and 2 read with Section 151 of the CPC and remanding the matter to the learned District & Sessions Judge, Sivasagar for doing the needful.

2. The matter relates to arbitration proceeding by and between the parties. To resolve the particular dispute by and between the parties, the Chairman cum Managing Director of the respondent corporation referred the matter to the appointed Arbitrator by his letter dated 19th/20th May, 1994. A question was raised by the petitioner about the validity of the appointment of the Arbitrator and the continuity of the arbitration proceeding. Aggrieved by the order passed by the Arbitrator on the questions so raised, the petitioner approached the Assistant District Judge, Sivasagar by filing an application under Section 31 and 33 of the Old Arbitration Act, 1940. The leanred ADJ by his order dated 30.9.1996 passed an order restraining the Arbitrator from continuing with the arbitration proceeding.

3. The aforesaid order was put to challenge by the corporation before this Court and the challenge was involved in MA(F) No. 30/1997 and Civil Revision No. 1/1997. By judgment and order dated 21.6.2002, this Court rejected the contention raised by the petitioner regarding appointment of the Arbitrator and continuity of the arbitration proceeding and consequently allowed the appeal and the revision petition with cost of Rs. 5000/-. The impugned order passed by the learned ADJ was set aside with the direction to the Arbitrator to proceed with the arbitration proceeding. It was held that the power to appoint the Arbitrator given to the member of the Corporation shall be read as the power to appoint given to the Chairman cum Managing Director of the Corporation under the contract. Be it stated here that the Arbitrator appointed by the Chairman cum Managing Director was one Sri C.K. Srinivasan.

4. After the aforesaid Judgment and Order of this Court, the petitioner was furnished to the letter dated 22.7.2002 issued by Sri A.K. Poddar I/C and DGM (Legal) E.R containing the information that said Sri Srinivasan has already retired from service and accordingly a new Arbitrator in terms of the Clause in the contract was being appointed. Thereafter, the petitioner received yet another letter dated 22.7.2003 furnishing the intimation that the earlier Arbitrator has resigned from the assignment and accordingly another person as Arbitrator has been appointed. The new Arbitrator is Sri A.K. Dutta, a retired Judge of Calcutta High Court. The new Arbitrator is to adjudicate the dispute, which was referred to said Sri Srinivasan.

5. Although, the petitioner has claimed that it has not been furnished with the formal appointment order of new Arbitrator, but on receipt of the notice from the Arbitrator it has entered appearance and has also filed written statement and counter claim on 3.11.2003. The respondent corporation has also filed their written statement and objection on 27.12.2003. The Arbitrator in the proceeding held on 20.3.2003 passed an order for supplying the formal copy of the approval as contained in the relevant file by which the new Arbitrator was nominated and appointed. It is the case of the petitioner that it could learnt from the order of the Arbitrator dated 1.11.2003 that the corporation had sent to the Arbitrator the relevant file to the new Arbitrator. The petitioner has contended that the custody of the file by the respondent corporation was illegal. However, such contention of the petitioner has been rejected by the Arbitrator vide order dated 9.3.2004.

6. According to the petitioner the pages in the file are not numbered and no list of contents of the file is to be found in the file. The petitioner has further contened that there is also no explanation as to how the file could reach the respondent corporation. Thus, the petitioner has expressed its doubt about the veracity of the contents in the file and that there might be changes in the file. Further contention of the petitioner is that the file, which has been dealt with by the erstwhile Arbitrator, might not have reached the new Arbitrator and large number of documents must be missing from the file.

7. The petitioner with the apprehension and attributing purported misconduct on the part of the new Arbitrator once again filed Misc. Arbitration Case No. 38/2005 on 9.5.2005 invoking the provisions of Section 31,33 and 41 of the Arbitration Act, 1940. Alongwith the said application, another application for temporary injunction being Misc. (J) Case No. 39/2005 has also been filed. The applications have been filed before the learned Civil Judge (Sr. Division) Sivasagar. The injunction matter was fixed for hearing on 3.6.2005. However, the same was deferred to 27.7.2005 on which date the learned Civil Judge passed the impugned order (Annexure-S), being aggrieved by which the petitioner has filed the instant application.

8. The order passed by the learned Civil Judge is quoted below:

27.7.2005.

Today was fixed for passing necessary order. The learned counsel for the petitioner filed his Hazira.

After going through the case records and the relevant provisions of amended Arbitration Act, I find that this Court has no jurisdiction to try/proceed further with the case and as such, the case is returned to the Hon'ble District & Sessions Judge, Sivasagar for doing the needful.

9. Mr. N. Dutta, learned Sr. Counsel assisted by Mr. G. Baishya, learned counsel for the petitioner submitted that the learned Civil Judge having not assigned any reason towards passing the impugned order dated 27.7.2005, the same is not sustainable in law. He submitted that even if it is construed to be an order passed refusing to entertain the application in view of the new Arbitration and Conciliation Act, 1996, but the arbitration proceeding having started under the Old Act of 1940, the learned Civil Judge has committed error of jurisdiction in passing the impugned order inasmuch as the said proceeding will have to be continued under the Old Act. In this connection he has referred to the decision of the Apex Court as reported in (2003) 10 SCC 572 (State of W.B. Vs. Amritlal Cheterjee).

10. Mr. Manoj Roy, learned Sr. Counsel assisted by Ms. D. Bhattacharjee and Ms. S. Senapati, learned counsel representing the respondent corporation supporting the impugned order, submitted that the petitioner having filed the earlier application (in respect of which the proceedings in MA(F) No. 30/1997 and Civil Revision No. 1/1997 had arisen) before the learned ADJ, Sivasagar, could not have filed the later application pertaining to this proceeding before the learned Civil Judge (Sr. Division) Sivasagar. In this connection he has referred to Section 31 of the Arbitration Act, 1940 in terms of which all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court and that all subsequent applications arising out of the same reference and the arbitration proceedings shall be made in that Court and no other Court.

11. According to Mr. Roy, learned counsel for the corporation, the petitioner has been dillydallying with the matter with the sole purpose of delaying the arbitration proceeding. Referring to paragraph 9 of the counter affidavit, he submitted that before the new Arbitrator, the petitioner till invoking the jurisdiction of this Court submitted series of applications almost on every day of the arbitration proceeding taking irrelevant and inconsistent pleas. According to him the petitioner is responsible for delay in conclusion of the arbitration proceeding initiated way back in 1994 by appointing the first Arbitrator on 19.5.1994.

12. At the first instance, it must be said in unequivocal terms that it is desirable that an arbitration proceeding as in the instant case comes to an end at the earliest opportunity and does not unnecessarily linger. The earlier proceeding initiated before this Court at the instance of the petitioner came to an end after about 5 years and the plea raised by the petitioner was rejected awarding the cost of Rs. 5000/-. As per the arbitration Clause, if the Arbitrator to whom the matter is originally referred dies or refuses or resigns for any reasons from the position of Arbitrator, it shall be lawful for the member of ONGC to appoint another person to act as Arbitrator in the matter. Such person shall be entitled to proceed with the reference from the stage it was left by his predecessor if both the parties consent to this effect failing which the Arbitrator is entitled to proceed de-novo.

13. It is in the circumstances, in which the earlier Arbitrator retired from service and resigned from the assignment of Arbitrator, the new Arbitrator had to be appointed. In terms of the earlier judgment and order passed by this Court

on 21.6.2002 in MA(F) No. 30/1997 and Civil Revision No. 1/1997, the Arbitrator was to proceed with the arbitration proceeding upon appearance of the parties. In terms of the said direction of this Court, the petitioner also appeared before the new Arbitrator and participated in the arbitration proceeding till such time it once again filed Arbitration Case No. 38/2005 on 9.5.2005 purportedly under Section 31, 33 and 41 of the Arbitration Act, 1940. The learned Civil Judge instead of deciding the matter at the earliest opportunity has referred the matter to the learned District & Sessions Judge, Sivasagar on the analogy that the provisions of the new Act of 1996 would apply in terms of which it is the District Judge, who has the jurisdiction in such matter.

14. The Arbitration and Conciliation Act, 1996 itself provides that the proceeding initiated earlier would continue to be the proceeding under the Old Act of 1940. In this connection, Section 85 of the Arbitration and Conciliation Act, 1996 may be referred to. The Apex Court in the case of Amritlal Cheterjee (supra) has held that irrespective of appointment of new Arbitrator after coming into force of the Arbitration and Conciliation Act, 1996 with effect from 25.1.1996, the arbitration proceeding initiated under the Old Act of 1940 would continue and deemed to be the proceeding under the Old Act. Accordingly, in the instant case also the arbitration proceeding having been initiated prior to coming into effect the new Act of 1996, the provisions of the Old Act i.e. Arbitration Act, 1940 shall apply to the arbitration proceeding.

15. During the course of hearing, Mr. Roy, learned counsel for the respondent corporation fairly agreed that it is the Old Act of 1940 which would be applicable and not the new Act of 1996. However, his objection regarding filing of the application before the learned Civil Judge (Sr. Division) Sivasagar in reference to Section 31 of the Arbitration Act, 1940 is that the earlier application in respect of which MA(F) No. 30/1997 and Civil Revision No. 1/1997 had arisen, having been preferred before the learned ADJ, the subsequent application could not have been filed before the learned Civil Judge (Sr. Division). According to him, the learned Civil Judge having regard to the provisions of the Section 31 of the Arbitration Act, 1940 has rightly referred the matter to the learned District & Sessions Judge. This argument has been advanced with the notion that the Courts of the ADJ and the Civil Judge (Ser. Division) are two distinct and different Courts. However, the position is not so. The earlier designation of ADJ has been change to that of Civil Judge (Sr. Division) in Assam, by the Bengal, Agra and Assam (Civil Courts (Assam Amendment) Act, 1996, which is reproduced below:-

ASSAM ACT NO. XV OF 1997
(Received the Assent of the President on 18th April, 1997)

THE BENGAL, AGRA AND ASSAM CIVIL COURTS
(ASSAM AMENDMENT) ACT, 1996

AN ACT Further to amend the Bengal, Agra and Assam Civil Courts Act, 1887, in its application to the State of Assam

Preamble- Whereas it is expedient further to amend the Bengal, Agra and Assam Civil Courts act, 1887, hereinafter referred to as the principal Act, in its application to the State of Assam, in the manner hereinafter appearing:
(Central Act XII of 1887)
It is hereby enacted in the Forty-seventh Year of the Republic of India as follows:
1. Short title, extent and Commencement -
(1) This Act may be called the Bengal, Agra and Assam Civil Courts (Assam Amendment) Act, 1996.
(2) It shall have the like extent as the principal Act.
(3) It shall come into force at once.

2. Substitution of words Assistant District Judge and Munsiff in Central Ac , XII of 1887 - In the principal Act, for the words, Assistant District Judge and Munsiff wherever they occur, the words and brackets, Civil Judge (Senor D ivision) and Civil Judge (Junior Division) respectively shall be substituted.

3. Repeal and saving - (1) The Bengal, Agra and Assam Civil Courts (Assam Amendm ent) Ordinance, 1996 is hereby repealed.

(2) Notwithstanding such repeal anything done or any action taken under the Ordi nance so repealed shall be deemed to have been done or taken under the correspon ding provisions of this Act.

16. In view of the above, the filing of the subsequent application is to be same Court and thus there is no violation of the mandates of Section 31 of the A ct. On being pointed out this position, Mr. Roy in his usual fairness submitted that if that be the position in Assam then the ground on which the impugned orde r is being supported false through. However, he submitted that there is necessit y for early disposal of the proceeding before the learned Civil Judge (Sr. Divis ion).

17. In view of the above, there cannot be any hesitation to hold that the le arned Civil Judge (Sr. Division) was wrong in passing the impugned order dated 2 7.7.2005 in Misc. (J) Case No. 39/2005 in Misc. Arbitration Case No. 38/2005 on the analogy that it is the new Act of 1996 which would be applicable conferring the jurisdiction to the learned District Judge, Sivasagar. In view of the well e stablished position that in the fact situation of the present case, it is the Ar bitration Act, 1940, provisions of which would be applicable to the instant case and not the new Act of 1996. Thus, the matter will have to be decided by the le arned Civil Judge (Sr. Division) Sivasagar.

18. Having regard to the fact that it is a long pending matter, it is expect ed that the learned Civil Judge would decide the entire matter as expeditiously as possible, preferably within three months of receipt of the records and copy o f this judgment and order. To facilitate, early hearing and final disposal of th e matter the parties shall appear before the learned Civil Judge (Sr. Division) Sivasagar on 26.3.2007.

19. Writ petition is allowed to the extent indicated above, leaving the part ies to bear their own costs.